APPENDIX A.

Title 28, United States Code, Section 1332(a)(1)

"§1332. Diversity of citizenship; amount in controversy (a) The District courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between: (1) Citizens of different States; . . ."

Rule, 23, Federal Rules of Civil Procedure

". . . (b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort."

APPENDIX B.

Opinion of the District Court of Appeal.

United States Court of Appeals for the Ninth Circuit.

George R. Carr, Appellant, vs. Beverly Hills Corporation, a corporation, John P. Lordan, Maynard Brandsma, Francis E. Brown, Robert W. Langley, Harry F. Dietrich, and Ross J. Ferrar, Appellees. No. 14,349.

May 23, 1956.

Upon Appeal from the United States District Court for the Southern District of California Central Division.

Before: Stephens, Fee and Chambers, Circuit Judges

James Alger Fee, Circuit Judge:

Appellant Carr, who was plaintiff in the District Court, owned 400, or 1.6% of the 24,521 outstanding shares of stock of Beverly Hills Corporation. This is a stockholders derivative action in which the corporation, four former members of its Board of Directors and two present officers thereof, one of whom is presently, and at the time complained of was, a member of the Board thereof, were joined as defendants. The complaint alleged that the individual defendants negligently and fraudulently managed the affairs of Beverly Hills during the period 1951-1952. Judgment is prayed against the individuals in favor of Beverly Hills for damages, accounting and attorney fees for plaintiff.

Defendants moved to dismiss the complaint on the ground of lack of jurisdiction and for failure to state a claim upon which relief can be granted. The facts relative to these issues were presented by affidavits and counter-affidavits by the consent of the parties. Defendants sought to have the case determined in the manner of

summary judgment, on the ground that there were no genuine issues of fact, but the court refused.

Here the trial court, upon a hearing in which all parties joined and upon presentation of proof by affidavits, found that there was no jurisdiction because there was no diversity of citizenship if Beverly Hills and Carr were aligned together as plaintiffs, inasmuch as the corporation and the individual defendants, all citizens of California, would be on both sides of the controversy.[1]

The sole issue before this Court then is whether or not the District Court determined correctly that it did not have jurisdiction over the subject matter of the action.

But the solution of this problem involves two other questions. First: Was the trial court bound to try the whole case upon the merits before determining the question of jurisdiction? Or, on the other hand, could a determination of the essential facts regarding the domination of Beverly Hills by certain of its Directors be made before trial of the other issues in order correctly to align the parties? Second: Were the findings of the court to the effect that there was, at the time of the commencement of action, no domination of Beverly Hills resulting in the destruction of its independent volition, clearly erroneous?

The question of jurisdiction can be raised either by motion to dismiss or by answer. It cannot be waived. Formerly, when bound by formalities, it might have been thought that a motion to dismiss went only to matters on the face of the complaint. But procedure is set up

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[1]See Smith vs. Sperling, 9 Cir., No. 14,334, filed May 21, 1956, and Smith vs. Sperling, 117 F. Supp. 781.

whereby it can be discovered whether there is a true issue of fact raised by a pleading. If there is no genuine issue of material fact, the court may grant judgment. If there is one fact or set of facts, which is established, the court may accept it as uncontroverted and try the remaining issues. All this may now be done where the complaint is the only pleading before the court.

By another rule, the court is empowered to isolate and try any issue in the case. Rule 42(b), Federal Rules of Civil Procedure. Since jurisdiction depends upon the facts and not, in the final analysis, upon the pleading, we hold it was proper for the court to try the facts at the basis of this question before going further. This is especially to be commended because, as noted above, the question must be tried, is decisive and cannot be waived. There is nothing inconsistent in this determination with the cases tried or disposed of before the Federal Rules of Civil Procedure were adopted. All these are to be distinguished.[2]

In this case, the question of fact was tried on affidavits. Although the trial of an issue of fact upon affidavits has been much criticized by textwriters and others as much more liable to error than one where the witnesses are available for cross-examination, and although such a trial is contrary to the almost universal practice of the federal courts, the point need not be considered by us in this case. Plaintiff and defendant could consent expressly to

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[2]Doctor vs. Harrington, 196 U. S. 579; Venner vs. Great Northern Railway Company, 209 U. S. 24; Central Railroad Company of New Jersey vs. Mills, 113 U. S. 249; Cutting vs. Woodward, 9 Cir., 255 Fed. 633. Koster vs. (American) Lumbermens Mutual Casualty Co., 330 U. S. 518, is a forum non conveniens case, and whatever is said about the question herein involved is dictum. See Swanson vs. Traer, 7 Cir., 230 F. 2d 228.

a determination without oral testimony. We hold they did acquiesce in a trial in camera upon affidavits. It was their case and they could try it any way they chose. No one has raised any objection on this score.

This Court has reviewed carefully the record. The findings of the trial court are approved as follows:

"(1) The plaintiff, George R. Carr, was at the time of the commencement of the within action and now is a citizen and resident of the State of Illinois.

"(2) The defendant, Beverly Hills Corporation (hereinafter for brevity sometimes referred to as the defendant Corporation or the Corporation) was at the time of the commencement of the within action and now is a corporation duly organized and existing under the laws of the State of California and is a citizen of said state.

"(3) The defendants, John P. Lordan, Maynard Brandsma, Francis E. Browne, Robert W. Langley, Harry F. Dietrich and Ross J. Ferrar, each was at the time of the commencement of the within action and now is a citizen and resident of the State of California.

"(4) The plaintiff was at the time of the commencement of the within action and had been at all times since on or about the month of June 1950 the owner and holder of 400 shares of the common stock of the defendant Corporation, being approximately 1.6% of the total issued and outstanding shares of the common stock of said Corporation.

"(5) The plaintiff brings this action as a derivative action in the right of and on behalf of the defendant Corporation, and seeks to recover a judgment in favor of said Corporation. Said Corporation is a real party in interest herein and an indispensable party.

"(6) The defendants, John P. Lordan, Maynard Brandsma, Francis E. Browne, Robert W. Langley, and Harry F. Dietrich were elected Directors of the defendant Corporation on or about February 28, 1949, and constituted its entire Board of Directors until March 25, 1953 when four of said five Directors (to wit, defendants Maynard Brandsma, Francis E. Browne, Robert W. Langley and Harry F. Dietrich) resigned and Messrs. Shirley C. Burden, Robert Denny, Homer Burnaby and Robert H. Clark were elected as Directors of said Corporation. At all times since March 25, 1953, the Board of Directors of the defendant Corporation has consisted of said Messrs. Shirley C. Burden, Robert Denny, Homer Burnaby and Robert H. Clark, and the defendant, John P. Lordan.

"(7) The defendant, Ross J. Ferrar, is now and at all times since September 15, 1950 has been employed by the defendant Corporation as General Business Manager. He has never been a Director of the Corporation. He was elected Treasurer of the Corporation on or about December 6, 1950 and has held that office at all times since and he was elected Secretary of the Corporation on or about December 8, 1952 and has held that office at all times since.

"(8) Plaintiff did not at any time prior to the commencement of the within action demand that the Board of Directors of the defendant Corporation or demand that the Corporation institute the within action in its own name or otherwise; and any such demand would have been futile. Plaintiff did on the 30th day of April, 1953, a few hours prior to the filing of the within action, deliver to the defendant, Ross J. Ferrar, a one page demand that the Corporation join plaintiff in prosecuting the within

action in this Court. Said demand was dated April 27, 1953, signed by the plaintiff, George R. Carr, and addressed to the Board of Directors of the Beverly Hills Corporation, and a true and correct copy of said demand, dated April 27, 1953, is attached to the Complaint herein, marked Exhibit G.

"(9) The amount in controversy in this action, exclusive of interest and costs, exceeds the sum of $3,000.

"(9A) The within action is not a collusive one to confer on a Court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction.

"(10) The defendant Corporation has not been under the domination of the individual defendants herein, or of any of them, or under the control of any person or persons who have been antagonistic or hostile to the financial interests of the Corporation, at any time since at least as early as March 25, 1953, and the defendant Corporation was not at the time of the commencement of the within action and is not now incapacitated from bringing or maintaining suit upon any cause or causes of action which may exist in its favor, including but not limited to the alleged causes of action set forth in plaintiff's Complaint herein, and said Corporation was not at the time of the commencement of the within action and is not now incapacitated from protecting its own financial interests.

"(11) Although formally designated as a defendant herein by the plaintiff, for the purpose of determining whether diversity of citizenship exists, the defendant Corporation must be realigned with the plaintiff as a plaintiff.

"(12) The within action is not one between citizens of different states and this Court did not have at the time of the commencement of the within action and does not

now have, jurisdiction, over the subject matter of the within action."

Upon the basis of these findings of fact, the trial court correctly realigned the parties and dismissed the cause for lack of jurisdiction.

Affirmed.

(Endorsed:) Opinion. Filed May 23, 1956.

Paul P. O'Brien, Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 468.

GEORGE R. CARR,

Petitioner,

vs.

BEVERLY HILLS CORPORATION, a corporation; JOHN P. LORDAN, MAYNARD BRANDSMA, FRANCIS E. BROWNE, ROBERT W. LANGLEY, HARRY F. DIETRICH, and ROSS J. FERRAR,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF RESPONDENT BEVERLY HILLS CORPORATION IN OPPOSITION.

Question Presented.

Whether the court below was in error in holding that the District Court lacked jurisdiction, on the ground of diversity of citizenship, to hear a derivative stockholder's suit where the corporation, the real party in interest and for whose benefit the action was brought, is a cititzen of the same state as the individual defendants, and the evidence clearly shows that the corporation has an independent board of directors, is not controlled by any of the individual defendants, and is not incapacitated from filing suit itself or from otherwise protecting its own financial interests.

Statutes Involved.

The statutes involved are Title 28, United States Code, Section 1332(a)(1) (set forth in Appendix A of the Petition), Rule 23(b), Federal Rules of Civil Procedure (also set forth in Appendix A of the Petition), and Rules 12(h) and 52(a), Federal Rules of Civil Procedure (printed in Appendix A, *infra*).

Statement of the Case.

Petitioner's statement of the case is devoted almost exclusively to a recitation of matters allegedly going to the "merits" of the action but which are clearly immaterial to a determination of the jurisdictional issue. Respondents twice tried to have the District Court determine these matters on their merits by motions but the trial court decided that it was without jurisdiction to do so. Therefore, we shall confine our brief to the facts relating to the issue of jurisdiction.

Petitioner is an Illinois citizen and the holder of 400 shares (1.6%) of stock in respondent Beverly Hills Corporation [R. 265]. Respondent Beverly Hills Corporation is organized pursuant to the laws of the State of California and all of the other respondents are citizens of and residents of the State of California [R. 265].

In the month of December, 1952, respondent corporation for the first time learned that petitioner was dissatisfied with the handling of some of the affairs of the corporation [R. 118, 122]. Immediately representatives of the corporation furnished information as requested to

petitioner, including an audit report covering all transactions between the corporation and the Beverly Hills Clinic [R. 138-140].

On March 25, 1953, four new members of the board of directors (Messrs. Denny, Clark, Burnaby, and Burden) of respondent corporation were elected and took office, replacing on said board respondents Brandsma, Browne, Langley, and Dietrich [R. 90, 94, 101, 110, 134, 135]. None of said new board members was a stockholder of said corporation or a partner of the Beverly Hills Clinic, but each was a well-known business leader in the Los Angeles area [R. 48, 51, 53, 134, 135, 182]. Petitioner's counsel was promptly notified of the names of the new members of said board of directors [R. 137], and was informed in writing on March 25, 1953, that if "there are any possible corporate claims which you think should be given attention, there is now an independent Board of Directors of the Corporation which will be available to give careful consideration to any matters when submitted by you" [R. 137]. No claims of any kind have ever been made by petitioner or his counsel to said new board of directors [R. 48, 51, 55, 182].

Only a few hours before petitioner filed the action, he delivered to respondent Ferrar a copy of the complaint herein, together with a "demand" that the corporation "join" in prosecuting the action against the individual respondents [R. 44, 45, 98, 99]. The complaint was, in fact, filed the same day and before the board of directors could even be called together to act upon said "demand"

[R. 99, 100, 140]. The complaint is purportedly filed "on behalf" of the corporation [R. 2] and seeks a money judgment in favor of the corporation [R. 25, 26].

The new board of directors of respondent corporation immediately began, through new counsel, a complete and independent investigation of the facts and the law involved in the claims set forth in the complaint herein [R. 56-57]. Said investigation continued through the course of four or five weeks [R. 58]. During said investigation, respondent corporation's counsel made a written request upon petitioner's counsel for any information petitioner had to support his charges [R. 80-82]. No such information has ever been furnished to the corporation or to any of its representatives [R. 76, 83-85, 192, 196].

The board of directors of respondent corporation met on June 24, 1953, to receive and consider its counsel's written report of its investigation of the facts and the law relating to petitioner's claims herein [R. 58]. Said board carefully analyzed each of the claims of the complaint and its counsel's findings thereon [R. 63-73]. The board of directors determined that the claims of petitioner were not meritorious; that heavy attorneys' fees, accounting charges, and other costs would be incurred by said corporation by reason of such litigation; that such litigation would probably delay the pending dissolution of the corporation; and that the expense and detriment which would be caused thereby to the corporation would far exceed any possible recovery in the suit

[R. 72, 73]. Accordingly, the independent board of directors resolved that for the best interests of said corporation and its stockholders, the corporation should not join in or prosecute the action but should "take whatever steps are necessary or possible to terminate the litigation with the least possible expense to the corporation" [R. 73].

The District Court found upon the above facts and other evidence that respondent corporation is the real party in interest herein and an indispensable party [R. 265]: that respondent corporation was not under the domination or control of any of the individual respondents or of any person who has been antagonistic or hostile to the financial interests of the corporation; and that the corporation was not and is not incapacitated from bringing or maintaining suit upon any cause of action which may exist in its favor or from protecting its own financial interests [R. 268].

The District Court under all of the circumstances determined that respondent corporation should be realigned as a plaintiff [R. 268]. Such realignment placed a California corporation among the plaintiffs and California citizens as defendants in the suit. There was, therefore, no diversity of citizenship and the District Court dismissed the action for lack of jurisdiction [R. 268, 269, 272].

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. (Appendix B of Petition.)

ARGUMENT.

The issue here is a narrow one and its determination below was based entirely upon the peculiar facts of the case. These facts were found by the District Court upon evidence which clearly supports the judgment. There is no real conflict between the decision below and decisions of this Court, and the Court of Appeals decision does not conflict with decisions of other Courts of Appeal. The decision below presents no issue of any substantial importance and does not warrant review by this Court on certiorari.

I.

The Decision Below Is Clearly Correct.

The decision below recognizes that the District Court was not bound, in determining jurisdiction upon the basis of diversity of citizenship, by plaintiff's arrangement of the parties but properly could look beyond the pleadings and arrange the parties according to the facts. The facts respecting jurisdiction were fully presented upon affidavits without objection, and showed clearly that when suit was filed an independent board of directors was in charge of the affairs of the Beverly Hills Corporation and was not dominated by the individual respondents or by anyone antagonistic to the interests of the corporation. The causes of action alleged in petitioner's derivative stockholder's complaint belonged to the corporation. The alleged "matter in controversy" was therefore one between the corporation, on whose behalf suit was brought, and the individual respondents. Since the corporation ("the real party in interest") and the individual respondents were all citizens of the State of California, the District Court, upon realignment of the parties, properly dismissed the action for lack of jurisdiction.

For purposes of jurisdiction, "the pleadings may be put aside, and the parties placed on different sides of the matter in dispute according to the facts". *Removal Cases, Meyer v. Delaware R. R. Construction Co.,* 100 U. S. 457, 469, 25 S. Ct. 591, 25 L. Ed. 593 (1879). It is the duty of the trial court thus to align the parties according to their real interests. *Helm v. Zarecor,* 222 U. S. 32, 32 S. Ct. 10, 56 L. Ed. 77 (1911).

In a stockholder's derivative suit such as the case at bar, the corporation is the real party in interest and is an indispensable party. *Meyer v. Fleming,* 327 U. S. 161, 167, 66 S. Ct. 382, 90 L. Ed. 595 (1946). In California, "As a general rule of law . . . where a stockholder of a corporation seeks to maintain an action for a wrong done to the corporation, such stockholder occupies no better or different position with relation thereto than would the corporation itself suing in its own behalf." *Reid v. Robinson,* 64 Cal. App. 46, 55, 220 Pac. 676, 680 (1923).

A stockholder has no absolute right to bring an action on behalf of his corporation. He may maintain such an action when the corporation is "disabled from protecting itself". *Koster v. (American) Lumbermens Mutual Co.,* 330 U. S. 518, 522-523, 67 S. Ct. 828, 91 L. Ed. 1067 (1947). Where the corporation is not under such disability, "it has a real interest in the litigation and it should be aligned as a party plaintiff, where its interest lies". *Hamer v. New York Railways Co.,* 244 U. S. 266, 37 S. Ct. 511, 514, 61 L. Ed. 1125 (1916).

The decisive factual question, therefore, in determining whether to align the corporation as a party defendant or as a plaintiff in a stockholder's derivative action is this: is the corporation in "antagonistic hands" so that

it is incapacitated to act to protect its own financial interests? Only when the corporation is so incapacitated is it proper to align it as a defendant in determining if diversity of citizenship exists. See *Doctor v. Harrington*, 196 U. S. 579, 25 S. Ct. 355, 49 L. Ed. 606 (1905); *Venner v. Great Northern Ry. Co.*, 209 U. S. 24, 28 S. Ct. 328, 52 L. Ed. 66 (1908); *Koster v. (American) Lumbermens Mutual Co., supra.*

The burden was upon petitioner to prove to the District Court that it had jurisdiction of the cause. *McNutt v. Gen. Motors etc. Corp.*, 298 U. S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936). This he failed utterly to do. Rather, it was clearly shown that the corporation was not in antagonistic hands and was fully able to protect its own financial interests [R. 267, 268].

The fact that the independent board of directors failed to "join" in or prosecute the action would not prove that the corporation was in antagonistic hands. A disagreement between a stockholder and his corporation over the advisability of prosecuting a claimed cause of action for the benefit of the corporation does not show that the managers of the company are antagonistic to the interests of the corporation. A decision not to litigate a poor lawsuit will preserve—not defeat—the corporate interest. It is interesting to note that if the corporation had "joined" in the suit as petitioner had purportedly "demanded", the very diversity upon which petitioner relies would have been extinguished.

Petitioner's complaint does not even pass the test he apparently claims is established by such decisions as *Doctor v. Harrington, supra.* He fails to allege that the board of directors of the corporation at the time suit was filed was dominated by or under the control of any of the

individual respondents, or that said board abused its discretion in not bringing suit, or that its failure to "join" in or institute the suit was improper or wrongful. Under California authorities the complaint failed to state a claim upon which relief could be granted in the absence of such allegations. *Findley v. Garrett,* 109 Cal. App. 2d 166, 240 P. 2d 421 (1952), (hearing denied by California Supreme Court), establishes that a good faith determination by an independent board of directors not to sue certain directors of a corporation is a bar to a stockholder's derivative suit.

See also *Corbus v. Alaska Treadwell Gold Min. Co.,* 187 U. S. 455, 23 S. Ct. 157, 47 L. Ed. 426 (1903); *Ashwander v. T. V. A.,* 297 U. S. 288, 56 S. Ct. 466, 80 L. Ed. 688 (1936); *Denicke v. Anglo-Calif. Nat. Bank* (9th Cir., 1944), 141 F. 2d 285.

Petitioner does not seriously challenge the adequacy of the evidence to support the judgment below. Certainly he has not shown that the Findings of Fact of the District Court are clearly erroneous, within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Petitioner misconstrues the decision of the Court of Appeals when he states that the action was dismissed "apparently for non-compliance with Rule 23(b) of the Rules of Civil Procedure" (Petition, p. 12). The decision below was not based on that ground at all but on lack of diversity. It is firmly established that Rule 23(b) does not deal with the jurisdiction of the courts but only prescribes the method by which jurisdiction shall be exercised. *Venner v. Great Northern Ry. Co., supra* (discussing the purpose of old Equity Rule 94, predecessor of present Rule 23(b)).

The District Court's finding that no demand for relief was made prior to suit by petitioner upon the corporation's board of directors, and that such a demand would have been "futile" [R. 266], is not inconsistent with its other findings. The board of directors had decided after a full investigation that the interests of the corporation would not be served by filing suit [R. 63-73]. A finding that a prior demand would have been "futile" merely made it clear from the Findings of Fact as a whole that the District Court dismissed the action because of the absence of diversity, not because of failure to comply with Rule 23(b).

The action of the board of directors in declining to join in or to prosecute the suit was made in good faith and upon sound grounds: the possibility of failure of the suit, the heavy legal and other expenses which the corporation would incur through litigation, possible delays in completing the pending dissolution of the corporation if the suit was maintained, and other cogent reasons [R. 72-73]. Further, the corporation would have been required to indemnify any and all of the individual respondents for their reasonable expenses and attorneys' fees if any of them was "successful in whole or in part" in defending the suit, whether the action was brought by the plaintiff or the corporation. California Corporations Code, Section 830.

Under these circumstances, and based upon advice of counsel who studied the matter carefully, the corporation's decision not to sue was not hostile to the corporation but, in fact, was an attempt to preserve the financial interests of the company. The corporation's motion to dismiss the action at an early stage was an eminently practical meas-

ure to avoid further legal expense to the corporation, expense which would surely have resulted from plaintiff's attempt to launch the company into prolonged and fruitless litigation.

II.

There Is No Conflict of Decisions.

The decision below does not conflict with decisions of this Court or with decisions of other Courts of Appeal. Where the courts have refused in derivative stockholders' actions to align the corporation as a party plaintiff, such refusal has been based upon facts, disclosed by the pleadings or evidence, showing that the corporation was controlled by the alleged wrongdoers or was otherwise disabled from protecting itself.

So in *Doctor v. Harrington, supra,* the court took as true the allegation that the "board of directors . . . is under the absolute control and domination of . . . John T. Harrington [who] by reason of having possession of a majority of the capital stock . . . likewise controls the action of the stockholders" 196 U. S. Ct., page 352.

In *Venner v. Great Northern Ry. Co., supra,* the jurisdictional facts were taken from plaintiff's bill, where it was alleged that "defendant James T. Hill . . . was the president of the other defendant, the Great Northern Railroad . . . and that railroad and its board of directors were under his absolute control." 209 U. S. at page 29.

The court found in *Cutting v. Woodward* (9th Cir., 1918), 255 Fed. 633, that the individual defendant and the corporation had engaged in *actual fraud* during the period when the individual defendant had virtual control of the

majority of the board of directors, and "they were ever ready to do his bidding".

Delaware & Hudson Co. v. Albany & Susquehanna, 213 U. S. 435, 29 S. Ct. 540, 53 L. Ed. 862 (1909), is a case where "the antagonism between the director and the corporate interest [is] unmistakable".

Koster v. (American) Lumbermens Mutual Casualty Co., supra, is a *forum non conveniens* case in which the court discussed the matter herein involved in dictum, and commented that "jurisdiction is saved in this class of cases by a special dispensation because the corporation is in antagonistic hands". 330 U. S. at page 523.

Groel v. United Electric Co. (C. C. N. J., 1904), 132 Fed. 252, was a suit by a stockholder against another corporation in which the court took as true the allegations of the bill which showed that "the New Jersey corporation is in the control of officers who are carrying out the purposes of the Pennsylvania company and its confederates". *East Tennessee V. & G. R. Co. v. Grayson,* 119 U. S. 240, 7 S. Ct. 190 (1886), is not a derivative suit but involved a complaint against illegal acts of the corporation itself.

The remaining cases cited by petitioner in his brief do not deal at all with the question of whether diversity exists after a proper alignment of parties in stockholders' derivative suits.

The decision of the court below is consistent with *Hamer v. New York Railways Co., supra,* where this Court affirmed dismissal of a stockholder's derivative suit after realignment of the corporation as a party plaintiff, "where its interest lies". 37 S. Ct. 514. The decision is also in harmony with *Dannmeyer v. Coleman*

(C. C., D. Calif., 1882), 11 Fed. 97, 103, where an alternative ground for dismissal of a stockholder's derivative suit against California citizens was the lack of jurisdiction which resulted from realigning the California corporation as a party plaintiff.

III.

No Important Question Is Presented.

There is no important legal or social question presented by the petition. The opinion of the Circuit Court is based entirely upon the Findings of Fact of the District Court. The opinion is succinct and expresses no generalizations which might control some different factual situation. The decision, therefore, can truly be said to turn upon its own facts.

The independence of the board of directors of the Beverly Hills Corporation and its good faith in determining not to bring suit were overwhelmingly supported by the evidence. This is a case totally unlike that presented by the ordinary type of stockholder's derivative suit, where at the time of suit the defendant officers or directors control the corporation. Accordingly, the decision below will not affect the course of the typical stockholder's derivative suit.

The result reached by the court below was fair and correct. A stockholder in California is not entitled to maintain a derivative action where the corporation is a free agent and for good cause refuses to be launched into expensive litigation. He should not be allowed to try to circumvent this wise policy by resorting to the already overcrowded federal courts for settlement of controversies which properly have no place there.

We understand that this Court has very recently granted petitions for a writ of certiorari in *Smith v. Sperling* (D. C. Cal., 1953), 117 Fed. Supp. 781 (9th Cir., 1956, No. 14,334, not yet reported), and *Swanson v. Traer* (7th Cir., 1956), 230 F. 2d 228. That fact, in our opinion, should not necessarily cause the Court to grant the within petition. First, the cases should, of course, be considered upon their own individual merits and, whatever the jurisdictional facts may show in the cited cases, we are confident that here the evidence supporting the Findings of Fact cannot be seriously challenged. Secondly, the complaint in the case at bar, apparently unlike those filed in said cited cases, fails even to allege that the board of directors was controlled or dominated by the alleged wrongdoers when suit was filed. These considerations justify, we believe, this Court's different treatment of the instant petition.

Conclusion.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL R. WATKINS,

Counsel for Respondent Beverly Hills Corporation.

IRA M. PRICE II,

CHARLES E. HORNING, JR.,

LATHAM & WATKINS,

Of Counsel.

Dated: October 24, 1956.

APPENDIX A.

Rule 12(h), Federal Rules of Civil Procedure.

". . . A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except . . . (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."

Rule 52(a), Federal Rules of Civil Procedure.

". . . In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."